No. 93-1995

JUL 7 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION, DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Protection Clause requires state assessed interstate natural gas pipelines be given the same property tax treatment that state assessed railroads are given pursuant to the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Kansas Supreme Court entered on January 21, 1994.

STATEMENT OF THE CASE

The basic facts of the case are stated in the opinions below and in the petition. Summarized, the basic facts of the case are as follows:

In Kansas, pipelines are state assessed public utilities, as are railroads. Kansas has classified property for property tax purposes, placing pipelines and railroads in the public utility subclass. In 1991 and 1992, pipelines and railroads were valued at true market value as required by Kansas law. As permitted by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act) (Pub. L. 94-210, 90 Stat. 31 [codified at 49 U.S.C. § 11503]) (Petitioners' Appendix D, 34a-35a), the railroads sued the State of Kansas in United States District Court for the District of Kansas. The 4-R Act requires railroads to be assessed at the same ratio to the true market value that the assessment of other commercial and industrial property has to the true market value of the other commercial and industrial property. Several months after the railroad lawsuits were filed, they were settled by the parties by the entry of consent decrees approved by the United States District Court for the District of Kansas. The settlement required the State of Kansas to assess railroad property at the same ratio to the true market value that the assessment of other commercial and industrial property has to the true market value of the other commercial and industrial property. The relief sought by the pipelines is to have the same assessment ratio applied to pipeline property that was applied to railroad property as a result of the consent decrees.

Petitioners do misstate several pertinent facts:

First, petitioners' allegation that the State of Kansas has singled out pipelines for higher tax treatment is totally unsupported by the record and is not true. As acknowledged by petitioners, these cases were presented to the State Board of Tax Appeals and the court below on stipulated facts. The parties stipulated that the property of the pipelines was valued at true market value and assessed at the percentage of

value required by state law. Furthermore, there was absolutely no showing that any railroad property was valued other than as required by state law. Railroad property was, however, equalized with commercial and industrial property in Kansas as required by the 4-R Act. See 49 U.S.C. §11503(b)(1) (Petitoners' Appendix D, 34a-35a). The equalization of railroad property with commercial and industrial property was ordered by the United States District Court for the District of Kansas.

Second, petitioners falsely characterize as a "special arrangement" and a "special deal" the railroad consent decrees. As stated above, what happened in the relevant years is that several railroads operating in Kansas sued the state in the United States District Court for the District of Kansas, under the provisions of the 4-R Act. Eventually, the railroad lawsuits were settled by the entry of consent decrees approved by the court. The consent decrees fashioned a settlement that was *appreciably more favorable* to the State of Kansas than what other states had achieved as a result of fully litigating the same claims. See, *e.g.*, *Trailer Train Co. v. Leuenberger*, *aff'd Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub dom. Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989) (rail cars entitled to total property tax exemption under the provisions of the 4-R Act when state property tax exemptions apply to three-fourths of the commercial and industrial property in the state and do not apply to rail cars). See also *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D. N.D. 1980), *aff'd* 657 F.2d 204 (8th Cir. 1981) *cert. denied* 454 U.S. 1086 (1981); *Department of Revenue v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Co. v. Blair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd in part, remanded in part* 766 F.2d 1222 (8th Cir. 1985); and *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983).[1]

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[1] All of these cases were decided prior to this Court's decision in *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994), and had found state property tax exemptions granted to commercial and industrial property violative of the 4-R Act when not granted to rail transportation property.

Third, petitioners malign the State Board of Tax Appeals' and the court below's supposed lack of understanding of the 4-R Act, as applied to the railroad litigants; however, as indicated by their written decisions (Petitioners' Appendices A, 1a-21a, and B, 22a-32a), both the Board and the court below had a full understanding of the requirements of the 4-R Act.

REASONS FOR DENYING THE WRIT

I. PROPERTY TAX RELIEF FOR INTERSTATE NATURAL GAS PIPELINES IS THE PREROGATIVE OF CONGRESS.

Interstate natural gas pipelines, operating in Kansas, are attempting to obtain, under the state's equal protection clause,[2] the same property tax relief given to the state's railroads under the 4-R Act.

In recent years, several bills have been introduced in Congress to provide property tax relief for interstate natural gas pipelines. In 1984, Senator Ford (D-KY) introduced S. 2932 to amend the Natural Gas Pipeline Safety Act of 1968, and the Hazardous Liquid Pipeline Safety Act of 1979, to provide property tax relief styled after the 4-R Act for interstate natural gas pipelines.[3] In 1987, Representative Hughes (D-NJ) introduced H.R. 2953,[4] and in 1989, Representative Larry Smith (D-FL) introduced H.R. 2378,[5] which were also designed to provide property tax relief styled after the 4-R Act for interstate natural gas pipelines. None of these efforts succeeded. To date, Congress has failed to enact property tax relief for interstate natural gas pipelines.

Kansas pipelines and Kansas railroads are defined as pub-

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[2] Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a). Additionally, petitioners claim a violation under the Equal Protection Clause of the United States Constitution. The Kansas Supreme Court has held that the uniform and equal rate of assessment and taxation provision of art. 11, § 1 of the Kansas Constitution is, in principle and effect, substantially identical to the principle of equality embodied in the Equal Protection Clause of the United States Constitution. *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 584, 701 P.2d 1314, 1326 (1985).

[3] 130 Cong. Rec. 23324 (1984).

[4] 133 Cong. Rec. 6376 (July 15, 1987).

[5] 135 Cong. Rec. 1976 (May 16, 1989).

lic utilities and valued and taxed exactly alike under Kansas law. Kan. Stat. Ann. § 79-5a01 (Appendix A, 1a) and Kan. Stat. Ann. § 79-5a04 (Appendix B, 2a-3a). Public utilities are separately classified under the Kansas Constitution for property tax purposes and assessed at 30% of true market value. Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a). Commercial and industrial personal property is also separately classified under the Kansas Constitution and assessed at 20% of depreciated cost. The 4-R Act requires railroad property to be equalized with the true market value of commercial and industrial property; consequently, in 1990 and 1991, several Kansas railroads sued the state in the United States District Court for the District of Kansas to obtain the equalization of their property with the true market value of commercial and industrial property. Kansas conceded that the railroads were entitled to have their property equalized with the true market value of commercial and industrial property,[6] and consent decrees were entered into by the parties and approved by the court. The pipelines want the provisions of the consent decrees and, by implication, the provisions of the 4-R Act extended to them.

The court below rejected the pervasive disruption of Kansas' classification system advocated by petitioners. As stated by the court below, "[t]o buy [petitioners'] argument, we would have to conclude the 4-R Act, in essence, eliminated the public utility subclass of property and transferred the same to the commercial and industrial subclass." See Petitioners' Appendix A, 18a. Such a holding would destroy Kansas' classification system, at least as applied to public utilities.

This Court has been hesitant to extend the provisions of a federal statute that preempts a state's taxation authority beyond its evident scope. *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, ___, 114 S. Ct. 843, 850-851, 127 L. Ed. 2d 165, 176 (1994). The court below recognized that the

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[6] To equalize a railroad's property, which is valued at true market value for assessment purposes, with commercial and industrial property, which is valued at depreciated cost for assessment purposes, it is necessary to reduce the assessment percentage applied to the railroad's value.

4-R Act preempted Kansas' classification of railroads as public utilities and required their property to be equalized with commercial and industrial property;[7] however, consistent with the preemption principles articulated by this Court, the Act's preemptive effect was limited to the railroads, thereby causing minimal interference with the state's classification system. See Petitioner's Appendix A, 14a-15a.

This Court has stated that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Generally, the Court will not conclude that Congress legislated the ouster of a state statute or constitutional provision in the absence of an unambiguous congressional mandate to that effect. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., concurring). See also *Cipollone v. Liggett*, 505 U.S. ___, ___, 112 S. Ct. 2608, 2626, 120 L. Ed. 2d 407, 432-433 (1992) (Blackmun, J., concurring).

Petitioners, in this litigation, are attempting to obtain from the judiciary what they have been unable to obtain from Congress. It is the prerogative of Congress, under its commerce powers, to determine whether interstate natural gas pipeline should be taxed like railroads. The court below properly rejected petitioners' attempt to obtain tax relief through the abrogation of the Kansas property tax classification sys-

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[7] Early in the litigation spawned by the 4-R Act, it was held that the 4-R Act abrogates incompatible state classification systems. See *State of Tenn. v. Louisville & N. R. Co.*, 478 F. Supp. 199, 206 (M.D. Tenn. 1979), *aff'd* 652 F.2d 59 (6th Cir. 1981), *cert. denied* 454 U.S. 834 (1981) (Congress' effort to revitalize the railroad industry by implementing the 4-R Act overrides the State's interest in maintaining a property tax classification system); and *Trailer Train Co. v. State Bd. of Equalization*, 511 F. Supp. 553 (N.D. Calif. 1981), *modified* 697 F.2d 860 (9th Cir. 1983), *cert. denied* 464 U.S. 846 (1983) (the power of the state to discriminate against rail transportation property for purposes of applying tax rates was preempted by the passage of the 4-R Act in 1976).

tem and, for that reason, this Court should deny the petition for writ of certiorari.

II. THE DECISION OF THE KANSAS SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioners argue that the decision of the court below conflicts with the decision of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 232 Neb. 806, 443 N.W.2d 249, *cert. denied* 493 U.S. 1078 (1990) ("*Northern Natural Gas*"). While it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property, a careful analysis of the case reveals that pipeline property was required to be equalized with railroad property under the Nebraska Constitution regardless of the ramifications of the 4-R Act. There is no conflict between the decision of the court below and the decision of the Nebraska Supreme Court in *Northern Natural Gas*. As a leading commentator in the area of state and local taxation has stated:

> It is also apparent that the railroads and carlines themselves, had they anticipated the court's opinion in *Northern Natural Gas*, would have had no need to pursue their remedies in Federal court under the 4-R Act because identical relief was available in state court, to wit, equalization with most other commercial and industrial property in the state. Not only does this reveal the irrelevance of the 4-R Act to the court's decision in *Northern Natural Gas*, it also indicates that even if the 4-R Act were repealed or modified, the pipelines, railroads, and carlines would be in precisely the same position in Nebraska as they are today. Indeed, the irony of the suggestion that the 4-R Act is somehow to "blame" for the predicament in which the *Northern Natural Gas* opinion has placed the state of Nebraska is that if the *Northern Natural Gas* case

> reflected the law in most states, there never would have been any need for the 4-R Act. Walter Hellerstein, *Equal Protection Run Amok?: An Analysis of the Nebraska Supreme Court's Decision in the Northern Natural Gas Case*, Tax Notes, November 20, 1989, p. 1000.

In short, Nebraska has a single class of property for assessment purposes,[8] and all property within such class is entitled to uniform and equal tax treatment under state law.[9] Kansas, by contrast, has classified property for assessment purposes and only requires uniform and equal tax treatment within constitutionally prescribed subclasses. Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a).[10] Under the Kansas classification system, public utility property constitutes one subclass of property, and commercial and industrial property constitutes another subclass of property. Under the 4-R Act, rail transportation property is required to be equalized with commercial and industrial property. See 49 U.S.C. § 11503(b)(1) (Petitioners' Appendix D, 34a-35a) (a state may not assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property). The 4-R Act defines "commercial and industrial property" to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commer-

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[8] Neb. Const., art. 8, § 1 (1984) (Appendix C, 4a-5a).

[9] The Nebraska legislature has authority to separately classify motor vehicles, trucks, trailers, semitrailers, truck-tractors, agricultural land, horticultural land and livestock. Neb. Const., art. 8, § 1 (1984) (Appendix C, 4a-5a).

[10] This Court has long held that state property tax classification systems based on reasonable distinctions between the classes are constitutional. See, *e.g.*, *Nordlinger v. Hahn*, 505 U.S. ___, ___, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13 (1992) (states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation); and *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) (legislatures have especially broad latitude in creating classifications and distinctions in tax statutes); See also *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-360 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527-528 (1959); and *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87-88 (1940).

cial or industrial use and subject to a property tax levy. See 49 U.S.C. § 11503(a)(4) (Petitioners' Appendix D, 34a-35a). Therefore, in order to comply with the provisions of the 4-R Act requiring rail transportation property to be equalized with commercial and industrial property, Kansas, unlike Nebraska, found it necessary to cross subclass lines for equalization purposes. This fundamental distinction, recognized by the court below (Petitioners' Appendix A, 15a), sets this case apart from the Nebraska case and explains any perceived inconsistency.

The decision of the court below is consistent with the decisions of the Tennessee Supreme Court in *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986) ("*Federal Express*") and of the Alabama Court of Civil Appeals in *State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ. App. 1984), *appeal denied* 474 U.S. 936 (1985) ("*Colonial Pipeline*"). The court below noted both *Federal Express* and *Colonial Pipeline* and relied on them in its analysis. See Petitioners' Appendix A, 15a-18a.

In *Federal Express*, the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55% rate applicable to public utility property rather than the 30% rate applicable to commercial and industrial property. In rejecting the contention that the Equal Protection Clause forbade the state from assessing the taxpayer's property at the rate applicable to utility property while assessing railroad property at the lower rate applicable to commercial and industrial property, the court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In *Colonial Pipeline*, the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. As in this case, the property of railroads had been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-

R Act. In its opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of pipelines, on the one hand, and railroads, on the other, would violate the Equal Protection Clause even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Federal Express and *Colonial Pipeline* hold that the 4-R Act has created a classification scheme that is binding on the states. So long as that classification scheme has a rational basis,[11] no substantial equal protection attack can be leveled against the classification. And this is so, regardless of how the states might have originally classified the property in question.

More recently, the Utah Supreme Court in *Kennecott Corporation v. Utah State Tax Com'n*, 858 P.2d 1381 (Utah 1993) ("*Kennecott*"), rejected the argument that state assessed taxpayers are entitled to the same tax treatment under the Equal Protection Clause as accorded to "similarly situated" state assessed railroads under the 4-R Act (the same argument made by petitioners). The court stated that to establish an equal protection violation, a party must demonstrate that the law creates a certain class of persons who are similarly situated and must show that the law is applied differently to members of the class without a reasonably related legitimate government purpose. The court found the 4-R Act was a distinguishing factor in determining that the railroads and Kennecott were not similarly situated.

The Alabama, Tennessee and Utah courts, like the court below, were required to make a classification analysis in deciding cases raising similar facts to the facts in this case be-

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[11] Clearly, the rational basis for the 4-R Act is the revitalization of the railway system of the United States. *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, ___, 114 S. Ct. 843, 846, 127 L. Ed. 2d 165, 171 (1994).

cause each state had separately classified public utility property in a way that conflicted with the requirements of the 4-R Act. Nebraska, on the other hand, had not separately classified public utility property and was required to equalize railroad property with commercial and industrial property under state law. Thus, petitioners are unable to show the Court a single case where the facts and applicable law are analogous in which the decision conflicts with the decision of the court below. For that reason, it would be inappropriate to grant the petition for certiorari.

III. THE DECISION OF THE KANSAS SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *ALLEGHENY PITTSBURGH COAL CO. v. COUNTY COMMISSION*, 488 U.S. 336 (1989).

This Court, in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989) ("*Allegheny Pittsburgh*"), prohibited the practice of a West Virginia county tax assessor of assessing recently purchased property at its purchase price, while making only minor adjustments in the assessments of property that had not recently been sold, in violation of West Virginia's constitutional provision requiring all property to be taxed at a uniform rate statewide according to its current market value. *Allegheny Pittsburgh* was not a 4-R case and had nothing to do with a state's compliance with the provisions of a federal law.

In *Nordlinger v. Hahn*, 505 U.S. ___, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992), this Court upheld California's constitutional provision requiring an "acquisition value" system of taxation (Proposition 13), finding it rationally based. 112 S. Ct. at 2335-2336, 120 L. Ed. 2d at 17. In railroad tax terminology, as will be explained below, the practice of the West Virginia county tax assessor, prohibited by this Court in *Allegheny Pittsburgh*, would be characterized as *de facto* discrimination, whereas the California "acquisition value" system of taxation, upheld by this Court in *Nordlinger*, would be characterized as *de jure* discrimination.

De jure discrimination arises when a taxation system requires similar property to be assessed at different rates. In contrast, *de facto* tax discrimination arises when a taxation system does not establish different rates of assessment, but through its operation nonetheless results in discrimination. See *General American Transp. Corp. v. Com. of Kentucky*, 791 F.2d 38, 40 (6th Cir. 1986); *Atchison, Topeka & Santa Fe Ry. v. State of Ariz.*, 559 F. Supp. 1237, 1243 (D. Ariz. 1983); *Clinchfield Railroad v. Lynch*, 527 F. Supp. 784, 785 n. 5 (E.D. N.C. 1981), *aff'd* 700 F.2d 126 (4th Cir. 1983); *Burlington Northern R. Co. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983); *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 552 F. Supp. 1031, 1039 (D. Kan. 1982), *aff'd in part, rev'd in part* 732 F.2d 1495 (10th Cir. 1984); and *ACF Industries, Inc. v. State of Ariz.*, 561 F. Supp. 595, 599 (D. Ariz. 1982), *aff'd* 714 F.2d 93 (9th Cir. 1983).

Unlike the situation in *Allegheny Pittsburgh*, the State of Kansas has not engaged in *de facto* property tax discrimination against either the railroads or the pipelines. The pipelines have stipulated that their property is valued at true market value as required by Kansas law. Just as significantly, there has been no showing that railroad property has not been valued at true market value.

Petitioners argue that the classification system of the Kansas Constitution is fully consistent with the mandate of the 4-R Act prohibiting discriminatory state tax treatment of railroads. See Petition, pp. 16-17. Petitioners' argument, however, is totally fallacious. The Kansas classification system prescribes a higher assessment percentage of value for the public utility subclass of property, which includes railroad property, than it prescribes for the commercial and industrial subclass of property. Moreover, commercial and industrial property is not valued at true market value like public utility property, but is assessed based on depreciated cost. Kan. Const., art. 11, § 1 (Petitioners' Appendix D, 36a-38a). The railroad consent decrees recognized this fact, and in order to comply with the provisions of the 4-R Act, ordered state officials to assess rail-

road property at the same percentage of value as applied to the true market value of commercial and industrial property.

The railroad consent decrees also exempted 80% of the railroad's personal property from taxation in Kansas. The railroads had argued that because Kansas had exempted 80% of its personal property from taxation, subsection (b)(4) of the 4-R Act had been violated. This argument was not novel and had been successfully raised by various railroads in 4-R lawsuits around the country. See, *e.g.*, *Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd* 657 F.2d 204 (8th Cir.), *cert. denied* 454 U.S. 1086 (1981) ("[subsection (b)(4)] requires if personal property of locally assessed business is to be exempt from ad valorem taxation the personal property of railroads must also be exempt"); *Burlington Northern R. Co. v. Blair*, 584 F. Supp. 1229 (D. Iowa 1984), *aff'd in part, remanded in part* 766 F.2d 1222 (8th Cir. 1988) ("illogical to make irrelevant the statutory exemption which has the most discriminatory effect on the taxation of [the railroad's] property"); and *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 417 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989) ("tax exemptions are to be considered in determining whether there has been discriminatory treatment under [subsection (b)(4)]"). See also cases collected on p. 13 n. 4 of the petition.[12]

Thus, the consent decrees did nothing more than implement the provisions of the 4-R Act as applied to railroads operating in Kansas. Kansas' classification of property for property tax purposes was disrupted only to the extent necessary to comply with federal law. Petitioners have failed to show a legally sufficient reason why Kansas' property tax classification system should be further disrupted.

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[12] This Court's decision in January, 1994, in *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994), holding that subsection (b)(4) of the 4-R Act does not limit a states ability to exempt nonrailroad property from taxation obviously makes the foregoing cases obsolete. Nonetheless, they definitely represented the state of the law at the time the consent decrees were approved by the federal court in this case.

CONCLUSION

In this case, the court below decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor, did it decide a federal question in a way that conflicts with the decision of another court of last resort or of a United States Court of Appeals. The court below merely applied long-recognized principles of federal preemption, recognized the purpose of the 4-R Act, and limited its preemptive effect to railroads for whose benefit it was enacted. For these reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Kan. Stat. Ann. § 79-5a01.

(a) As used in this act, the terms "public utility" or "public utilities" shall mean every individual, company, corporation, association of persons, lessees or receivers that now or hereafter are in control, manage or operate a business of:

(1) A railroad or railroad corporation if such railroad or railroad corporation owns or holds, by deed or other instrument, an interest in right-of-way, track, franchise, roadbed or trackage in this state;

(2) transmitting to, from, through or in this state telegraphic messages;

(3) transmitting to, from, through or in this state telephonic messages;

(4) transporting or distributing to, from, through or in this state natural gas, oil or other commodities in pipes or pipelines, or engaging primarily in the business of storing natural gas in an underground formation;

(5) generating, conducting or distributing to, from, through or in this state electric power;

(6) transmitting to, from, through or in this state water if for profit and subject to regulation of the state corporation commission;

(7) transporting to, from, through or in this state cargo or passengers by means of any vessel or boat used in navigating any of the navigable watercourses within or bordering upon this state.

(b) The terms "public utility" or "public utilities" shall not include: (1) Rural water districts established under the laws of the state of Kansas; or (2) any individual, company, corporation, association of persons, lessee or receiver owning or operating an oil or natural gas production gathering line which is situated within one county in this state and does not cross any state boundary line; or (3) any individual, company, corporation, association of persons, lessee or receiver owning any vessel or boat operated upon the surface of any manmade waterway located entirely within one county in this state.

APPENDIX B

Kan. Stat. Ann. § 79-5a04.

The director of property valuation shall annually determine the fair market value of public utility property, both real and personal, tangible and intangible, of every public utility as defined in subsection (a) of K.S.A. 79-5a01 and amendments thereto.

As used in this section, "fair market value" means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. For the purposes of this definition, it shall be assumed that consummation of a sale occurs as of January 1.

The division of property valuation in determining the fair market value of public utility property shall, where practicable, determine the unit valuation, allocated to Kansas, and in doing so shall use generally accepted appraisal procedures developed through the appraisal process and may consider, including but not by way of exclusion, the following factors:

(a) Original cost.

(b) Original cost less depreciation or reproduction cost less depreciation, or both, or replacement cost new less depreciation, except that where either method is used proper allowance and deduction shall be made for functional or economic obsolescence and for operation of nonprofitable facilities which necessitate regulatory body approval to eliminate.

(c) The market or actual value of all outstanding capital stock and debt.

(d) The utility operating income, capitalized in the manner and at such rate or rates as shall be just and reasonable.

(e) Such other information or evidence as to value as may be obtained that will enable the property valuation department to determine the fair market value of the property of such public utility.

The fair market value of affiliated properties separately assessed, or the nonoperating properties of such companies, or both, shall be ascertained and determined as nearly as pos-

sible and deducted from the total unit value of the properties of such companies if such properties are included in the unit value. Except for the property of any entity enumerated in subsection (b) of K.S.A. 79-5a01 and amendments thereto, and insofar as it is practicable to do so, the same method of evaluating the properties of companies separately assessed or nonoperating properties, or both, shall be used as was used in determining the unit value of such companies. All property of any entity enumerated in subsection (b) of K.S.A. 79-5a01 and amendments thereto, shall be valued by the county or district appraiser in the same manner as provided by law for the valuation of the same type or class of property in the county.

APPENDIX C
Nebraska Constitution (1984)

Art. 8, § 1.

The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles and may also establish a separate class of motor vehicles consisting of those owned and held for resale by motor vehicle dealers which shall be taxed in the manner and to the extent as provided by the Legislature and may also establish a separate class for trucks, trailers, semitrailers, truck-tractors, or combinations thereof, consisting of those owned by residents and nonresidents of this state, and operating in interstate commerce, and may provide reciprocal and proportionate taxation of such vehicles; *Provided*, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall, for property tax purposes, be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses, and prescribe standards and methods for the determination of the value of real or other tangible property at uniform and proportionate values. The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation. Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine, and such intangible property held in trust or otherwise for the purpose of funding pension, profit-sharing, or other employee benefit

plans as defined by the Legislature may be declared to be exempt from taxation. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature. The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock in this state for only part of a year.